

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: Operation of the Missouri River System Litigation)	No. 03-MD-1555 (PAM)
)	
)	
STATE OF MISSOURI, ex rel. Jeremiah W. (Jay) Nixon,)	
)	
vs.)	Civil No.
)	
UNITED STATES ARMY CORPS OF ENGINEERS, FRANCIS J. HARVEY, SECRETARY OF THE ARMY, UNITED STATES DEPARTMENT OF DEFENSE, and BRIGADIER GENERAL GREGG F. MARTIN)	
)	COMPLAINT
)	
Defendants.)	
)	

STATE OF MISSOURI'S COMPLAINT

1. The State of Missouri brings this action for preliminary and permanent injunctive and declaratory relief against the United States Army Corps of Engineers, Secretary of the Army Francis J. Harvey ("Harvey"), and Brigadier General Gregg F. Martin ("Martin"), in their official capacities, for violations of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA"); and the Administrative Procedures Act, 5 U.S.C. § 701 et seq. ("APA"), arising out of the Corps' adoption of the Missouri River Master Water Control Manual, Revision 1, Incorporation of Technical Criteria for Bimodal Spring Pulse Releases from Gavins Point Dam ("Revision") on or about February 28, 2006.

2. The State of Missouri depends on the Missouri River for many uses. The River serves as the water supply for approximately one-half of Missouri's 5.6 million citizens. More than half of the water delivered by public water supplies to Missourians is for domestic use. Thousands

of acres of Missouri farm land are adjacent to or otherwise directly affected by the flow of the Missouri River, particularly when the river rises. Of the 1.4 million acres of flood plain below the Gavins Point Dam, 1 million acres are located in Missouri. A substantial portion of that flood plain has been designated prime farm land by the United States Department of Agriculture. The River also has important commercial, recreational, and fish and wildlife attributes. A number of large Missouri metropolitan areas - including the two largest, St. Louis and Kansas City - are located on the Missouri River.

3. Because of Missouri's dependence on the Missouri River, any significant change in the management of the river, such as the Revision, will significantly affect the human environment in Missouri.

4. This is a civil action for declaratory and preliminary and permanent injunctive relief to prevent the U.S. Army Corps of Engineers ("Corps") from implementing the Revision contrary to federal law.

JURISDICTION

5. This action arises under the FCA; the Declaratory Judgments Act, 28 U.S.C. § 2201; the APA; NEPA; and the Corps' Master Manual. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

VENUE

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and (e) and 5 U.S.C. § 703, and pursuant to *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003).

PARTIES

7. Plaintiff State of Missouri ("Missouri") is a sovereign state and brings this action on its own behalf and as *parens patriae* for its residents.

8. Jeremiah W. (Jay) Nixon is Missouri's duly elected, qualified and acting Attorney General. He is authorized to file this complaint to protect the State's interests.

9. Defendant Harvey is the Secretary of the Army and is ultimately responsible for the operation of the main stem reservoirs on the Missouri River.

10. Defendant Martin is the Division Engineer for the Corps that issued the Memorandum of Decision ("MOD") approving the Revision.

11. The United States Army Corps of Engineers is charged with the maintenance of the Missouri River channel and control of the river's big dams. 33 U.S.C. § 701-1. This complaint will refer to the Defendants collectively as "the Corps."

GENERAL ALLEGATIONS

12. The Corps operates six dams and reservoirs on the main stem of the Missouri River. Those dams and reservoirs are Fort Peck in Montana, Garrison Dam and Lake Sakakawea in North Dakota, Oahe in North Dakota and South Dakota, Big Bend Dam and Lake Sharpe in South Dakota, Fort Randall Dam and Lake Francis Case in South Dakota, and Gavins Point Dam and Lewis and Clark Lake in Nebraska and South Dakota. They are among the largest dams of their design in the world. The reservoirs created upstream from the dams are vast. The dam at Lake Oahe can impound about 23 million acre-feet (MAF) of water, enough to cover about half of Missouri with one foot of water, or about seven times the amount of water that could be impounded in Missouri's Table Rock Lake.

13. Pursuant to the authorities arising under the Flood Control Act, the Corps adopted and published a Master Water Control Manual in 1979 for the purpose of operating the main stem Missouri River reservoirs. No affected person appealed the Corps' adoption of the 1979 Master Manual or any of its provisions. The Corps revised the 1979 Master Manual on March 19, 2004 ("Master Manual").

14. As part of the process required by NEPA, prior to adoption of the Master Manual, the Corps issued a final environmental impact statement ("FEIS") in March 2004. The FEIS was produced only after 15 years of study and public input and at least four draft environmental impact statements. Despite this history, the Revision makes a major change in the Master Manual that was not analyzed in the FEIS. Worse yet, this change was made in just a few months with little public participation and inadequate study of the change, despite the fact that the Corps stated its intention to adopt a plan like the Revision more than two years before its adoption.

15. The FEIS considered a number of alternatives other than the plan the Corps ultimately adopted as the Master Manual, although it did not consider or study the impact of the Revision. Some of the alternatives included short-term increases in the amount of water released from the Gavins Point Dam. Such an increase was referred to in the FEIS as a spring rise, recognizing the fact that the release would intentionally raise the level of the river and could have substantial impacts downstream. The Revision, without explanation, now refers to the increases as spring pulses. The alternative selected by the Corps and adopted in the Master Manual did not include a spring rise.

16. All of the spring rise alternatives considered in the FEIS differed from the Revision in a number of significant ways:

- A. All of the alternatives were for a single release during the spring. The Revision includes two spring releases more than a month apart.
- B. None of the alternatives considered a rise in March. The Revision includes a March rise.
- C. All of the alternatives were for longer duration rises than the Revision.
- D. None of the alternatives based the amount of the spring rise on the amount of water in the reservoir system. The rises in the Revision are expressly limited by the level of the reservoir system storage, “thereby protecting upstream uses.” MOD p. 2.
- E. None of the alternatives based the amount of the spring rise on forecasted upstream runoff. The Revision does: As upstream runoff increases, and the risk of downstream flooding also increases, so does the amount of the spring rise.

17. In March 2006, the Corps issued an environmental assessment (“EA”) of the planned spring rise. The EA acknowledges that the Revision presented an increased risk of flooding over the Master Manual. EA §§ 4.3.2, 5.4.3. The EA also recognizes that the Revision substantially reduces the water supply benefits to those who rely on the upstream reservoirs and the river for water due to the reduction in reservoir levels as a result of the spring rise. EA § 4.3.4. At some places, the EA compares the Revision to the 2004 Master Manual, and at other places, the EA compares it to the 1979 Master Manual. In comparing the Revision to the 2004 Master Manual, the EA acknowledges that the Revision would have a negative impact on 8 of the 15 categories it examined. EA §§ 4.3.2-4.3.16. Further confounding the reader, the Revision uses the 1979 Master Manual as the baseline,

even though the action being taken is based on, and should be compared to, the current Master Manual. Unless the impacts are compared to the water control plan currently in place, it is difficult to determine how the Revision compares to the current plan or the other alternatives considered in the FEIS.

18. The EA also acknowledges the existence of a new factor raised for the first time in the course of preparing the EA. EA § 5.4.5. The United States Department of Agriculture has stated that federal crop insurance will not cover any losses from flooding as a result of the spring rise. The EA drew no conclusions on the impact of this new factor. Furthermore, the Corps did not even analyze the impacts of the Revision on the drainage of prime farmland. The Corps should have thoroughly analyzed these impacts before it adopted the Revision, particularly with the apparent lack of crop insurance coverage for affected farmers.

19. The Corps' minimal attempts at consultation prior to issuing the EA and adopting the Revision were mere window dressing. During the summer of 2005, the Corps convened a diverse, basin-wide stakeholder group to make recommendations on the development of a spring rise plan. After days of meetings, the group was unable to reach consensus on a plan. However, the group unanimously agreed that no spring rise should occur if total system storage was less than 40 million acre feet ("MAF"). Nevertheless, without a rational basis or adequate environmental study, the Corps ignored the group and adopted a plan that provides a spring rise if there is 36.5 MAF in system storage. The EA did not explain why the group was ignored, nor did it adequately evaluate how the decrease in system storage requirements would impact the environment. This was arbitrary and capricious.

20. The EA did not conclude that the Revision did not have a significant adverse impact on the natural or human environment. Rather, it stated that there were “no significant adverse impacts to the natural or human environment *beyond those previously presented in the FEIS for the spring rise alternatives.*” EA § 6.0 (emphasis added).

21. The adverse impacts of the Revision are not limited to Missouri and other downstream states. Upstream states will also be negatively affected because the release of water from upstream reservoirs during the spring rise contemplated in the revision will make it more difficult for the Corps to maintain the reservoirs at levels sufficient to meet the needs of the upstream states during the rest of the year.

22. The sole justification for the Revision is the Corps’ attempt to comply with a biological opinion (“BiOp”) from the United States Fish and Wildlife Service (“FWS”) delivered in connection with the development of the Master Manual. The FWS opined that some form of spring rise was necessary to protect the pallid sturgeon, an endangered species. However, neither the BiOp, the FEIS, nor the EA contains any scientific evidence that the particular spring rise adopted in the Revision will have any positive impact on the pallid sturgeon.

COUNT ONE

23. Missouri incorporates by reference and realleges the paragraphs above.

24. NEPA, 42 U.S.C. § 4332(C), requires that the implementing agency must prepare an environmental impact statement (“EIS”) for any federal action significantly affecting the human environment.

25. The Revision is a federal action significantly affecting the human environment.

26. The Council on Environmental Quality (“CEQ”), created by NEPA, 42 U.S.C. §§ 4341-47, adopted implementing regulations governing the purpose and preparation of an EIS at 40 CFR Chapter V.

27. 40 CFR § 1502.9(c)(1) requires an agency to prepare a supplement to an EIS if:

- A. The agency makes substantial changes in the proposed action that are relevant to environmental concerns;
- B. There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

28. The Revision is a substantial change in the Master Manual that is relevant to environmental concerns.

29. The potential lack of federal crop insurance coverage for damages that result from flooding due to a spring rise is significant new information relevant to environmental concerns and bearing on the Revision or its impacts.

30. The Corps was required by NEPA and the implementing regulations to prepare a new EIS or a supplement to the FEIS and comply with all the requirements of the CEQ regulations prior to adopting or implementing the Revision.

31. Rather than prepare a new EIS or a supplement to the FEIS, the Corps relied solely on the EA. Interested parties, including Missouri, have been denied a full analysis of the proposed action as required pursuant to CEQ regulations, 40 C.F.R. Part 1502, and a full and fair opportunity to comment on the proposed action after such analysis, 40 C.F.R. Part 1503.

32. The Corps' own rules specify that the only purpose of an EA is to provide a basis for determining whether to prepare an EIS or a Finding of No Significant Impact. 33 C.F.R. § 230.10(a). The Corps did neither. Rather, it concluded that there was a significant impact, but the impact was within the "range of alternatives" in the FEIS. The Corps thus attempts to substitute the EA for full NEPA compliance - in violation of its own rules.

33. The Corps has failed to comply with NEPA by:

- A. Failing to prepare a new EIS or a supplemental EIS as required;
- B. Failing to analyze fully the impacts the Revision will have on the environment;
- C. Failing to provide all affected and interested parties a full and fair opportunity to comment on the Revision; and
- D. Substituting an EA for the EIS or FONSI required by NEPA and the Corps' own regulations.

34. The Corps' attempt to substitute the EA for a new EIS or a supplement to the FEIS is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

35. Missouri does not have an adequate remedy at law.

36. Missouri will suffer irreparable injury if the spring rise is allowed to occur.

WHEREFORE, Missouri is entitled to a declaratory judgment and a preliminary and permanent injunction:

- A. Declaring that the Revision is a federal action significantly affecting the human environment;

- B. Declaring that the Revision a substantial change in the Master Manual that is relevant to environmental concerns;
- C. Declaring that there are significant new circumstances or information relevant to environmental concerns and bearing on the Revision or its impacts;
- D. Declaring that the Corps is required by NEPA and the implementing regulations to prepare a new EIS or a supplement to the FEIS and comply with all the requirements of the CEQ regulations prior to implementing the Revision;
- C. Enjoining the Corps from implementing the Revision without full NEPA compliance; and
- D. Granting further relief that the Court deems proper.

COUNT II

36. Missouri incorporates by reference and realleges the paragraphs above.

37. The Corps' reliance on the "range of alternatives" presented in the March 2004 FEIS does not satisfy NEPA's requirement that the Corps take a "hard look" at the environmental impacts of proposed actions, including the Revision. During the process leading up to adoption of the Master Manual, the Corps considered a range of alternatives from no change from the prior manual up to and including allowing the river to run its course without Corps intervention. All of these alternatives, including all spring rise alternatives, were rejected by the Corps when it adopted the Master Manual. If the Corps is now allowed to adopt an entirely new action without complying with NEPA because the action fits within the extremely broad "range of alternatives" considered by the Corps in the prior NEPA process, the Corps would have unfettered discretion to make any change to the Master Manual without NEPA compliance.

38. The Corps may maintain that the “range of alternatives” includes only those that fall between the various “spring rise” or “GP” alternatives expressly described in the FEIS itself, and not the entire universe of alternatives studied during the Master Manual Review and Update process. In that event, the Revision still violates NEPA because the Corps has not taken a “hard look” at the infinite number of alternatives that fall between the specific alternatives described in the FEIS. Narrowing the “range of alternatives” to an unstudied and infinite pool of alternatives bounded only by the extremes of the studied spring rises included in the FEIS would frustrate the Congressional mandate of NEPA.

39. The adoption of any substantial change in the Master Manual as adopted by the Corps would be a federal action significantly affecting the human environment.

40. Any such change therefore would require the preparation of an EIS to comply with NEPA.

41. Reliance on the “range of alternatives” in the FEIS would not constitute compliance with NEPA because the Corps previously rejected those alternatives. If the Corps were now to suggest that one of those alternatives were acceptable or preferable, it could only do so if it fully complies with NEPA, provides the necessary analysis, and provides a full and fair opportunity for all interested parties to comment on the new analysis and the Corps’ change of position.

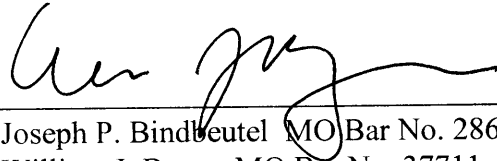
WHEREFORE, Missouri is entitled to a declaratory judgment and a preliminary and permanent injunction:

- A. Declaring that any significant change in the Master Manual is a federal action significantly affecting the human environment;

- B. Declaring that any such change requires preparation of a new EIS and full NEPA compliance prior to adoption of the change;
- C. Enjoining the Corps from implementing any change to the Master Manual based on the “range of alternatives” in the FEIS without full NEPA compliance; and
- D. Granting further relief that the Court deems proper.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General



Joseph P. Bindbeutel MO Bar No. 28656
William J. Bryan MO Bar No. 37711
H. Todd Iveson MO Bar No. 37650
Assistant Attorneys General

8th Floor, Broadway Building
P.O. Box 899
Jefferson City, MO 65102
Fax No. (573) 751-8796